Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 77-110

THOMAS B. BYERLY, JOHN W. GILKES,
THOMAS H. GILKES and MICHAEL HEALY,
Petitioners,

-vs-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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June 24, 1977

TABLE OF CONTENTS

Page

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

The decision of the Court of Appeals erroneously fails to decide an important question of Federal law which has not been but should be settled by this Court, and said decision is in conflict with the decision of another Court of Appeals on the same matter, to-wit: the standard to be applied upon the question of sufficiency of the evidence.

CONCLUSION 5

PROOF OF SERVICE 5

APPENDIX A-1

TABLE OF AUTHORITIES

Cases:	Page
Glasser v. U.S., 315 U.S. 60 (1942)	4
U.S. v. Bradley, 447 F.2d 657 (3rd Cir. 1971)	4
U.S. v. Martinez, 486 F.2d 15 (5th Cir. 1973)	4
U.S. v. Maslanka, 501 F.2d 208 (5th Cir. 1974)	4
U.S. v. Warner, 441 F.2d 821 (5th Cir. 1971)	4
Amendment V, Constitution of the United States	2, 4
Title 18, Section 2, United States Code	2
Title 21, Section 841(a)(1), United States Code	2
Title 21, Section 955, United States Code	3
Title 21, Section 957, United States Code	3
Title 21, Section 960, United States Code	3
Title 28, Section 1245 (1), United States Code	2
Title 28, Supreme Court Rules, Rule 19 1(b)	2
Opinion of the United States Court of Appeals for the Third Circuit	A-1

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioners as named above respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on April 11, 1977. Petition for Rehearing was timely filed and was denied by the Third Circuit on May 27, 1977. The Third Circuit granted Petitioners' Motion to Stay Mandate pending Application for Writ of Certiorari on June 8, 1977.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

Jurisdiction of this Court is invoked under 28 USC Section 1245(1) and 28 USC, Supreme Court Rules, Rule 19 1(b).

QUESTION PRESENTED

Whether the Court of Appeals applied the proper standard on the question of sufficiency of the evidence.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States:

Amendment V.

". . . nor be deprived of life, liberty or property without due process of law. . ."

STATEMENT OF THE CASE

On July 1, 1975, petitioners were arrested by a combined force of federal and state law enforcement officers and charged with violations of the laws of the state of Delaware relating to drugs. An indictment was returned on July 8, 1975, by the Grand Jury for the District of Delaware (Case No. 75-96) charging petitioners with the following violations of the laws of the United States:

Count I: Distribution of Marijuana, (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2);

Count II: Possession of Marijuana with Intent to Distribute (Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2).

A document characterized as a "superseding indictment: (Case No. 75-165) was returned on November 6, 1975. Petitioners were charged with the following violations:

Count I: Conspiracy to Distribute Marijuana, To Possess Marijuana with Intent to Distribute, to Import Marijuana, to Possess on Board a Vessel Marijuana not entered on cargo manifest or manifest of official supplies (Title 21, United States Code, Sections 955 and 960) and to Import Marijuana without Registration with the Attorney General (Title 21, United States Code, Sections 957 and 960);

Count II: Importation of Marijuana;

Count III: Transfer of Marijuana on a Vessel without Registration with the Attorney General;

Count IV: Possession of Unmanifested Marijuana.

Petitioners pleaded not guilty to all counts on November 19, 1975.

Jury trial commenced on June 28, 1976, and the jury returned a verdict of guilty as to each Defendant on Counts I, II and IV of the indictment (Count III was dismissed) on July 1, 1976. Petitioners were found and adjudicated guilty and were sentenced on August 12, 1976.

Notices of Appeal were timely filed.

Petitioners herein seek review of the affirmance of their convictions by the Third Circuit Court of Appeals.

REASON FOR GRANTING THE WRIT

The decision of the Court of Appeals erroneously fails to decide an important question of Federal law which has not been but should be settled by this Court, and said decision is in conflict with the decision of another Court of Appeals on the same matter.

The Court of Appeals based its opinion regarding the question of sufficiency of the evidence on the case of *U.S. v. Bradley*, 447 F.2d 657 (3rd Cir. 1971) (A-3), facially relying on the opinion of this Court in the case of *Glasser v. U.S.*, 315 U.S. 60 (1942).

Petitioners urged upon the Court of Appeals the standard enunciated in the case of *U.S. v. Warner*, 441 F.2d 821 (5th Cir. 1971), *U.S. v. Martinez*, 486 F.2d 15 (5th Cir. 1973); *U.S. v. Maslanka*, 501 F.2d 208 (5th Cir. 1974), to-wit: that based upon the evidence viewed in the light most favorable to the Government (*Glasser v. U.S., supra*) must sustain the conclusion that reasonable minds could conclude that the evidence is inconsistent with the petitioners' hypothesis of innocence.

The Government, in opposition, urged that a defendant may be convicted on circumstantial evidence alone, although the evidence does not exclude every reasonable hypothesis save that of guilt. This theory is provided by the Third Circuit opinion in *U.S. v. Bradley, supra*.

Due to this obvious conflict concerning an obvious due process question, albeit applied herein at the appellate level, this Court should consider the question. Given the inherent right to due process, the presumption of innocence and the burden upon the Government to establish a defendant's guilt beyond and to the exclusion of every reasonable doubt, the divergence should and must be resolved, *Amendment* V, United States Constitution.

CONCLUSION

The application of the standard of testing the sufficiency of the evidence by the Third Circuit Court of Appeals is in clear conflict with the opinion of another Court of Appeals, said latter opinion being grounded upon authority supplied by this Court, wherefore the writ should be issued for resolution of the conflict.

For these reasons Petitioners respectfully ask that the Writ of Certiorari issue.

Respectfully submitted

JAMES R. YON
620 Madison Street
Tampa, Florida 33602
Attorney for Petitioners

PROOF OF SERVICE

I HEREBY CERTIFY that all parties required to be served herein have been served and further certify that three copies of the foregoing Petition For Writ of Certiorari have been served upon the United States Solicitor General, Department of Justice, Washington, D.C. 20530 and upon the office of the United States Attorney for the District of Delaware, New Federal Building and Courthouse, Wilmington, Delaware, by air express this 24th day of June, 1977.

JAMES R. YON
620 Madison Street
Tampa, Florida 33602
Attorney for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 76-2273

UNITED STATES OF AMERICA
v.
THOMAS B. BYERLY,
Appellant
(D. C. Crim. No. 75-165-3)

No. 76-2274

UNITED STATES OF AMERICA
v.
JOHN W. GILKES,
Appellant
(D. C. Crim. No. 75-165-4)

No. 76-2275

UNITED STATES OF AMERICA
v.
THOMAS H. GILKES,
Appellant
(D. C. Crim. No. 75-165-5)

No. 76-2276

UNITED STATES OF AMERICA
v.
MICHAEL HEALY,
Appellant
(D. C. Crim. No. 75-165-6)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Submitted under 3rd Cir. Rule 12(6) March 31, 1977

Before VAN DUSEN, GIBBONS and GARTH,
Circuit Judges

Fred T. Cadmus, III, Esq.,
West Chester, Pa.
and
James R. Yon, Esq.,
Tampa, Florida,
Attorneys for Appellants

W. Laird Stabler, Jr., U.S. Attorney;
John H. Mc Donald, Assistant U.S. Attorney;
Wilmington, Delaware,
Attorneys for Appellee

JUDGMENT ORDER

After considering the contentions raised by appellants, to wit, that:

(1) the trial court erred in denying appellants' motion to dismiss on the ground of denial of a speedy trial;[1]

(2) the trial court erred in denying appellants' motion to suppress the evidence; [2] and

(3) the evidence was insufficient to sustain the

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1. See Opinion of March 10, 1976 (D. Del., Crim. No. 75-165), Part V (appendix at 13, 43-55); Opinion of June 25, 1976 (D. Del., Crim. No. 75-165) (appendix at 101-105).

2. See Opinion of March 23, 1976 (D. Del., Crim. No. 75-165) (appendix at 59-107), Part IV (appendix at 83-86).

verdicts of the jury;[3]

it is

ADJUDGED AND ORDERED that the judgments of the district court be and are hereby affirmed.

BY THE COURT:-

_____

Circuit Judge

Dated: April 11, 1977.

Attest:

_____

Clerk

3. The evidence was sufficient to sustain the verdict. See, *e. g.*, *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Bradley*, 447 F.2d 657, 659 (3d Cir. 1971); McCormick on Evidence, pp. 635-37 (1954 ed.).